U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch

Al's Food Store, **Appellant,** **v.** **Retailer Operations Division,** **Respondent.**	**Case Number: C0248738**

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the Retailer Operations Division properly withdrew the authorization of Al's Food Store (Appellant) to participate as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it withdrew the authorization of Appellant to participate in SNAP.

AUTHORITY

7 USC § 2023 and the implementing regulations at 7 CFR § 279.1 provide that "A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS."

CASE CHRONOLOGY

Appellant submitted an online authorization form FNS-252, entitled *Supplemental Nutrition Assistance Program Application for Stores* on January 12, 2021. The FNS-252 reported that ten percent of the firm's actual gross retail sales were in staple foods; 25 percent were in "accessory" food items such as snack foods, carbonated and non-carbonated beverages, condiments and spices;15 percent were in hot food items; one percent were in cold prepared foods; and 49 percent of its actual gross retail sales were in non-food items (gas, lottery, tobacco, alcohol, and other non-food items). An FNS contractor conducted a store visit on March 28, 2021, to document the firm's food inventory for the purpose of determining the continued eligibility of

Al's Food Store to participate in the SNAP. The store visit report showed that the store was deficient in the dairy staple food category.

The Retailer Operations Division sent a proof of inventory letter to Appellant dated July 21, 2021, requesting that the store submit any purchase invoices or receipts documenting that the store normally carried **three varieties** of dairy staple food in sufficient stocking units. The letter stated that the invoices/receipts had to be dated no more than 21 days prior to the date of the store visit and not after the store visit. Appellant provided receipts; however, the receipts that Appellant submitted were not within the 21-day time period.

After considering the available evidence, the Retailer Operations Division informed Appellant by letter date August 16, 2021, that the authorization of Al's Food Store to participate in the SNAP was withdrawn because the firm did not meet the eligibility criteria for stores as mandated by SNAP regulations at 7 CFR § 278.1(b)(1). The letter stated that the Appellant failed to meet Criterion A because the store did not have the required minimum variety of staple food. The store also failed to meet Criterion B because the store's staple food sales did not comprise more than 50 percent of its annual gross retail sales.

In a letter dated August 25, 2021, ownership appealed the Retailer Operations Division's decision and requested an administrative review. The appeal was granted and implementation of the withdrawal has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2018 and § 278 of Title 7 of the Code of Federal Regulations (CFR). In particular, 7 CFR § 278.1(l)(1) and § 278.1(k)(2) establish the authority upon which FNS shall withdraw the SNAP authorization of any firm which fails to meet established eligibility requirements.

7 CFR § 271.2 states that Retail Food Store means:

> An establishment that sells food for home preparation and consumption normally displayed in a public area, and either offers for sale, qualifying staple food items on a continuous basis, evidenced by having no fewer than [three*] different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety, including at least one variety of perishable foods in at

least [two*] such categories, (Criterion A) as set forth in of this chapter, or has more than 50 percent of its total gross retail sales in staple foods (Criterion B) as set forth in § 278.1(b)(1) of this chapter as determined by visual inspection, marketing structure, business licenses, accessibility of food items offered for sale, purchase and sales records, counting of stockkeeping units, or other accounting recordkeeping methods that are customary or reasonable in the retail food industry as set forth in § 278.1(b)(1) of this chapter. Entities that have more than 50 percent of their total gross retail sales in: Food cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation and consumption, including prepared foods that are consumed on the premises or sold for carry-out are not eligible for SNAP participation as retail food stores under § 278.1(b)(1) of this chapter.

7 CFR § 271.2 states:

> Staple food, means those food items intended for home preparation and consumption in each of the following four categories: Meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products. The meat, poultry, or fish staple food category also includes up to three types of plant-based protein sources (i.e., nuts/seeds, beans, and peas) as well as varieties of plant-based meat analogues (e.g., tofu). The dairy products staple food category also includes varieties of plant-based dairy alternative staple food items such as, but not limited to, almond milk and soy yogurt. Hot foods are not eligible for purchase with SNAP benefits and, therefore, do not qualify as staple foods for the purpose of determining eligibility under § 278.1(b)(1) of this chapter.

7 CFR § 278.1(b)(1)(i)(A) imparts program requirements for retail food store participation, which states:

> An establishment or house-to-house trade route shall normally be considered to have food business of a nature and extent that will effectuate the purposes of the program if it sells food for home preparation and consumption and meets one of the following criteria: Offer for sale, on a continuous basis, a variety of qualifying foods in each of the four categories of staple foods as defined in § 271.2 of this chapter, including perishable foods in at least three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment or route in staple foods (Criterion B).

7 CFR § 278.l(b)(1)(ii)(A) provides that in order for a retail store to qualify for authorization under Criterion A, firms shall:

> Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, no fewer than

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*As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion.

> [three*] different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least [two*] staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods o offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement."

7 CFR § 278.l(b)(1)(iii) provides that in order for firms to qualify for authorization under Criterion B:

> Firms must have more than 50 percent of their total gross retail sales in staple food sales. Total gross retail sales must include all retail sales of a firm, including food and non-food merchandise, as well as services, such as rental fees, professional fees, and entertainment, sports, games income.

7 CFR § 278.1(b)(6) regarding access states:

> FNS will consider whether the applicant firm is located in an area with significantly limited access to food when the applicant firm fails to meet Criterion A per paragraph (b)(1)(ii) or Criterion B per paragraph (b)(1)(iii) of this section so long as the applicant firm meets all other SNAP authorization requirements. In determining whether an applicant is located in such an area, FNS may consider access factors such as, but not limited to, the distance from the applicant firm to the nearest currently SNAP authorized firm and transportation options. In determining whether to authorize an applicant despite its failure to meet Criterion A and Criterion B, FNS will also consider factors such as, but not limited to, the extent of the applicant firm's stocking deficiencies in meeting Criterion A and Criterion B and whether the store furthers the purposes of the Program. Such considerations will be conducted during the application process ….

7 CFR § 278.1(l)(1) reads, in part: FNS may withdraw the authorization of any firm authorized to participate in the program for any of the following reasons:

> (i)The firm's continued participation in the program will not further the purposes of the program; (ii) The firm fails to meet the specification of paragraph (b), (c), (d), (e), (f), (g), (h), or (i) of this section; (iii) The firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section...for the time period specified in paragraph (k)(2) of this section; or, for co-located wholesale/retail firms, the firm fails to meet the requirements of paragraph (b)(1)(vi) of this section, for the time period specified in paragraph (k)(2) of this section;"

7 CFR § 278.1(k)(2) reads, in relevant part: FNS shall deny the application of any firm if it determines that:

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*As currently implemented. See SNAP Retailer Policy and Management Division Policy Memorandum 2018-04 for additional information regarding the enhanced retailer standards, which were implemented on January 17, 2018. This memorandum can be found on the FNS public website at https://www.fns.usda.gov/snap/retailer-eligibility-clarification-of-criterion.

> The firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B, as specified in paragraph (b)(1)(i) of this section.... Any firm that has been denied authorization on these bases shall not be eligible to submit a new application for authorization in the program for a minimum period of six months from the effective date of the denial.

APPELLANT'S CONTENTIONS

Appellant made the following summarized contentions in its administrative review request dated August 25, 2021, in relevant part:

- Appellant provided documentation that it meets the requirements.
- The determination letter explained that the store was missing three varieties of dairy, however, Appellant carries milk, cheese, and eggs.
- Much of the community relies on Appellant because its prices are fair, and it is within walking distance to public housing apartment complexes.

In support of its contentions, Appellant submitted 45 pages receipts to show its inventory.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

Criterion A

Federal regulations at 7 CFR § 278.1(b)(1)(ii) state that in order to qualify for SNAP authorization under Criterion A, a firm it must offer for sale no fewer than **three** different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each variety. This means that retail stores must have qualifying staple food items displayed in a public area on a continuous basis at the time of the store visit to qualify for SNAP authorization under Criterion A. In this case, the firm was deficient in two qualifying varieties of dairy staple food items. The firm only carried sufficient stocking units of milk.

On July 21, 2021, the Retailer Operations Division informed Appellant that it was missing dairy staple food items and requested that the store submit any purchase invoices or receipts documenting that the store normally carried **three varieties** of these this staple food category in sufficient stocking units. The letter stated that the invoices/receipts had to be dated no more than 21 days prior to the date of the store visit and not after the store visit. Appellant submitted receipts but they were not within the requested period.

With its administrative review request, Appellant submitted 45 pages of receipts to show that it normally carries the required dairy staple food items. Each of the receipts was dated after the store visit. Moreover, the receipts do not support that Appellant carried at least three stocking units of three varieties of dairy staple food items at the time of the store visit. It is important to

clarify that eggs are not considered a dairy variety and instead is a variety in the meat, poultry, or fish staple food category.

Based on the evidence, the firm did not carry sufficient staple food inventory as required for eligibility under Criterion A on the day of the store visit.

Criterion B

In the event of a firm's failure to meet the requirements of eligibility under Criterion A, federal regulations require that the firm's eligibility also be evaluated under Criterion B. In order to qualify for authorization under Criterion B, more than 50 percent of a retail store's total annual gross retail sales must come from the sale of staple foods. Based on the FNS store visit photographs and the application, the Retailer Operations Division determined that Appellant was also ineligible for authorization under Criterion B according to 7 CFR § 278.l(b)(1)(iii). Appellant's SNAP reauthorization application estimates that ten percent of its gross annual retail sales come from the sale of staple foods. The Retailer Operations Division correctly determined that Appellant was not eligible under Criterion B.

Need for Access

Appellant explains that the community relies on Appellant for its fair prices, good customer service, and that the firm is located withing walking distance. The record shows that the Retailer Operations Division requested this information as part of the need for access review. SNAP regulations at 7 CFR § 278.1(b)(6) state that FNS will consider whether or not the Appellant firm is located in an area with significantly limited access to food when the firm fails to meet Criterion A or Criterion B as long as it meets all other eligibility requirements. The Retailer Operations Division determined that the Appellant firm did not qualify for SNAP authorization under this provision.

CONCLUSION

The Retailer Operations Division's decision to withdraw the authorization of Appellant to participate as a retailer in the SNAP is sustained. In accordance with 7 CFR § 278.1(k)(2) Appellant will not be eligible to participate in the SNAP for a period of six months. The withdrawal shall become effective 30 days after receipt of this decision.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. If a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

Mary Kate Karagiorgos February 8, 2022
ADMINISTRATIVE REVIEW OFFICER